NO. 76

In the Supreme Court of the United States

OCTOBER TERM, 1952

EDWIN E. HEALY and GORDON W. HARTFIELD,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

The question presented in this case was settled by this Court in *United States* v. *Lewis*, 340 U.S. 590, with which the decision below is in complete accord. Reaffirming the principles laid down in *North American Oil* v. *Burnet*, 286 U.S. 417, this Court in *Lewis* held (pp. 591-592) that under our "annual" system of tax accounting a taxpayer who reports compensation received under a "claim of

right" and without restriction as to its use, and in a later year is required to restore a part of it because of the invalidity of his claim, may not reopen his return and recalculate his tax for the earlier year but may deduct the amount repaid as a loss in the year of repayment. Applying this rule, the court below correctly held that taxpayers, who had received compensation in 1945 and reported the amounts received as income in their tax returns for that year, could not reopen the returns in order retroactively to expunge from the reported compensation of that year portions which they subsequently (1947 and 1948) relinquished in satisfaction of transferee liability. The decision below is also in accord with *Fleischer* v. *Commissioner*, 158 F. 2d 42 (C.A. 8th), which involved the precise question here presented. It is in conflict, however, with *Commissioner* v. *Smith*, 194 F. 2d 536 (C.A. 6th), in which the Government has filed a petition for a writ of certiorari, No. 138, this Term.

The petition for certiorari in the *Smith* case requests summary reversal of the decision below in that case, on the authority of this Court's decisions in *Lewis* and *North American Oil*. On the basis of the same authorities, and for the reasons set forth in our petition in the *Smith* case, we believe that summary affirmance of the decision below or a denial of certiorari is likewise appropriate here. The Tax Court regarded the stipulated facts of this case as "almost identical" with those of *Smith*

(R. 12);[1] it was of the opinion that its decision in that case "governs" its decision in this one (R. 12); and its decision in this case, as in *Smith*, was rendered prior to *Lewis*. The only difference between the two cases lies in the circumstance that the Court of Appeals for the Sixth Circuit in *Smith*, in reviewing the Tax Court's decision, disregarded or overlooked this Court's intervening decision in *Lewis*, while the Court of Appeals for the Second Circuit in this case correctly followed the principles upheld in *Lewis*. Since this Court's decision in that case has removed these principles from the area of controversy,[2] it would seem unnecessary to have further briefs and argument in the present cases. In the words of the court below (R. 17), the mere "citation of *North American Oil* v. *Burnet, supra,*

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[1] The Tax Court properly declined (R. 12) to distinguish the cases on the ground that the subsequently accrued transferee liability was admitted by taxpayers here, whereas it was contested by the taxpayer in *Smith*. See *Fleischer* v. *Commissioner, supra*. The common factor decisive of both cases is that no transferee liability was asserted by the Commissioner or recognized by the taxpayers until a year subsequent to that in which the compensation was received under a claim of right and reported as income.

[2] The Court declared that the "claim of right" rule is a corollary of the "annual accounting" rule, and is now deeply rooted in the federal tax system; that exceptions to the rule are not permissible merely because the taxpayer is mistaken as to the validity of his claim; and that the rule applies irrespective of whether its application in a particular case results in an advantage or disadvantage to a taxpayer. 340 U.S., at 591-592.

and *U. S.* v. *Lewis, supra,* would seem to be sufficient to demonstrate that" a taxpayer may not reopen his tax return for a prior year in order to reflect a subsequently accrued transferee liability.[3]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JULY 1952.

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[3] In contending (Pet. 7-10) that the compensation which they reported in the taxable year was not received under a "claim of right," because their claim to a part of it was invalid, petitioners advance the very argument which this Court unequivocally rejected in *Lewis.* See also *Rutkin* v. *United States,* 343 U. S. 130. The argument rests (Pet. 7-10) upon *Commissioner* v. *Wilcox,* 327 U. S. 404, which was distinguished in *Lewis* (340 U. S., at pp. 591-592) and has since been limited to its facts in *Rutkin* (343 U. S., at p. 138).

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